No. 791

UNITED STATES OF AMERICA

IN THE

SUPREME COURT

LIVINGSTON E. OSBORNE,
Petitioner,

vs.

A. J. HASTINGS, Sheriff of
Berrien County, Michigan,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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The decision of this case in the Circuit Court of Appeals for the Sixth Circuit is reported as follows:

Hastings v. Osborne, 131 Fed. (2d) 396.

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(Numbers in parentheses refer to pages in Record of Circuit Court of Appeals).

I. STATEMENT.

The facts in this case have been sufficiently stated in our petition for writ of certiorari. A general statement of the laws of Michigan on the subject of body executions, jail limits bonds and escapes is esential to a clear understanding of the questions involved. We shall, therefore, attempt to outline the procedure concisely and without argument before presenting the points involved in our petition.

Body execution (capias ad satisfaciendum) is not allowed in Michigan for actions upon contract or simple debt, being prohibited by the state constitution, but the constitution expressly permits such process for fraud. Michigan Constitution of 1908, Article Two, Section 20. Body execution is expressly preserved by statute in proper cases. Michigan Compiled Laws of 1929, Section 14538. It is available in tort actions generally, including actions for deceit and fraud. *Fuller v. Bowker,* 11 Mich. 204; *Forsythe v. Washtenaw Circuit Judge,* 180 Mich. 633; *Westerhouse v. Ottawa Circuit Judge,* 212 Mich. 457;

Metcalf v. Moore, 128 Mich. 138; *Sink v. Oceana Circuit Judge*, 146 Mich. 121.

When body execution is issued, it is the duty of the sheriff to take the judgment defendant and keep him in secure custody at defendant's expense until he shall satisfy the execution or be discharged according to law. Michigan Compiled Laws of 1929, Section 14565. If the expense of keeping the judgment defendant is not collected from him, the sheriff may demand payment thereof from the judgment plaintiff, and if the same is not paid, he is not required to retain the prisoner. Id., Section 14756.

The judgment defendant will, of course, be discharged upon payment of the judgment. He may also obtain the liberty of the jail limits which are co-extensive with the limits of the county, upon executing a bond to the sheriff. Id., Section 14729. Such bond shall be conditioned that the person so in custody of such sheriff shall not at any time or in any manner escape or go without the jail limits of the county until legally discharged. Id., Section 14731. The bond thus taken is held for the indemnity of the sheriff and the judgment plaintiff. Id., Section 14732. This bond is referred to as a jail limits bond.

The jail limits bond so executed is given to the sheriff in his official capacity and also as indemnity to his successor in office without any written assignment. It is a substitute for the custody of the prisoner, and the judgment defendant then becomes the prisoner of his surety. *Kruse vs. Kingsbury*, 102 Mich. 100; *Smith, Sturgeon & Company v. Grosslight*, 123 Mich. 87; *Optner v. Bolger*, 95 Fed. (2d) 241, (6th Circuit). The escape of a judgment defendant from the county after the giving of a jail limits bond cannot be excused except for the act of God or the enemies of the country. *Smith, Sturgeon & Company vs. Grosslight*, supra; *Optner v. Bolger*, supra.

If the judgment defendant shall escape from the county, the plaintiff has his choice of two remedies.

1. He may take action against the sheriff, or

2. He may obtain an assignment of the jail limits bond from the surety and sue the obligors on the bond.

Mich. Comp. Laws, 1929, Sections 14736-14752.

The measure of his damages is the amount of his original judgment plus interest. Id., Section 14745.

The statute does not give the prisoner the right to surrender himself, but gives the sureties on his bond the right to surrender him and prescribes the procedure therefor as follows:

> "The sureties in any bond given for the liberties of any jail may surrender their principal at any time before judgment shall be rendered against them on such bond; but such bail shall not be exonerated thereby from any liability incurred before the making of such surrender.
>
> "Such surrender may be made as follows: The bail may take their principal to the keeper of the jail and upon the written requirement of such bail the keeper shall take such principal into his custody and thereupon endorse upon the bond given for the limits an acknowledgment of the surrender of such principal; and such keeper shall also, if required, give the bail a certificate acknowledging such surrender." Mich. Comp. Laws, 1929, Sections 14734, 14735.

If the prisoner escapes from the county and judgment is recovered against the sheriff therefor, the sheriff is entitled to a stay of proceedings upon such judgment until he shall have had a reasonable time to sue and collect on the jail limits bond. Id., Section 14748. The ultimate responsibility in every case, therefore, is that of the obligors on the bond.

In the present case the defense was actually presented by counsel representing United States Fidelity & Guaranty Company, surety on the jail limits bond, as shown by the affidavit of said counsel which was filed in the Circuit Court of Appeals in opposing the motion to dismiss the appeal. (Affidavit of Mr. Dunham, paragraph 5).

II. THE EFFECT OF THE ASSUMING OF UNPROVED FACTS BY THE CIRCUIT COURT OF APPEALS.

We preface our discussion of this matter by quoting the last paragraph of the opinion of the Circuit Court of Appeals:

131 Fed. (2nd) 396, 400.

> "We suggested in our opinion in *Optner v. Bolger*, supra, that the circumstances there considered invited, if they did not compel, a search for exceptions to an archaic rule governing imprisonment for debt and the consequences of an escape. Perhaps in this case we have found the invitation even more alluring, for it appears that since judgment in the earlier case Abbott for years has been out of Berrien County, has practiced law in Ann Arbor and in Detroit, has presented himself for various purposes before judges of this court in Detroit, Cincinnati and Louisville, and has been generally regarded as a nonresident of Berrien County. It also appears that the sheriff subjected to the judgment, never had custody of Abbott, knew nothing of the case, and was never in possession of the jail limits bond. Finally, it is also clear that the assignee of the judgment must have known, for they were matters of public record, of each of the defenses here and in the Optner case, asserted. The legal effect of these circumstances we do not consider, for we reach decision solely upon the view that the statute does not provide an exclusive method of surrender, that there is no Michigan authority that so holds, and that under the common law a voluntary surrender by the principal is effective where the plaintiff has notice of it, as in this case he had."

The following quoted facts in the foregoing paragraph were not proved and had no support of evidence in the record, were not admitted by this petitioner and we do not now admit them, that is to say:

> "It appears that since judgment in the earlier case Abbott for years has been out of Berrien County, * * * has presented himself for various purposes be-

> fore the judges of this court in Detroit, Cincinnati and Louisville and has been generally regarded as a nonresident of Berrien County."

The only evidence in the record as to the whereabouts of Mr. Abbott from the time of his alleged surrender in January, 1936, to the date of the trial of this case in September, 1941, is his testimony on pages 56 and 57 that some time prior to 1941 he opened a law office in Detroit and later one in Ann Arbor and did not reside in Berrien County during the last past year. The circuit judges, therefore, in adopting different facts, drew upon some sources outside the record of this case, apparently including their personal observations.

It is also important to observe that there is no proof in the record that the party holding the judgment against Mr. Abbott had any knowledge that Abbott had violated the obligation of the jail limits bond until the time action was started in April, 1941.

Petitioner promptly applied for an order vacating the judgment of the Circuit Court of Appeals and in the alternative applied for rehearing, claiming among other things that the above quoted paragraph revealed bias and prejudice on the part of the circuit judges. The integrity, character and honorable intentions of the circuit judges are not at all questioned. The petitioner does claim, however, that they hold opinions on matters of fact which weighed upon their minds in their consideration of the case and which must be assumed to have affected the decision.

It is difficult to assess the exact values of the various matters referred to in the paragraph of the opinion above quoted. It is a part of the opinion. We cannot assume that it was added for mere embellishment. There is a reason why the Circuit Court of Appeals revealed its inclinations and its reasoning processes in this paragraph. The judges candidly state their inclination and desire to "search for exceptions" to that rule of law which petitioner invoked. The inclination and desire were based, at least in part, upon facts which the court assumed to be true but which were not before the court for its considera-

tion. In this paragraph the court reveals the wish, and in other parts of the opinion the court reveals the thought, that the case should be reversed. The court does not say that the wish is father to the thought, but says

> "The legal effect of the circumstances we do not consider."

We must, therefore, assume, and we do assume, that the circuit judges were not conscious of any prejudiced attitude toward the case. That fact, however, is not at all controlling. Judges, being human, will always tend to believe that their own views are unprejudiced. It is trite to say that an opinion colored by prejudice will be defended with more than ordinary conviction.

The opinion refers to *Optner v. Bolger,* which is reported in 95 Fed. (2d) 241. That was an action for escape brought for a previous escape of this same judgment defendant. The action was brought against the United States Marshal to whom the capias ad satisfaciendum was issued, and the Circuit Court of Appeals in that case held that the action should have been brought against the sheriff who was directly responsible for keeping the prisoner within the county. The Circuit Court of Appeals in that case, as in this one, commented rather unfavorably upon process against the person and its incidents as prevailing in Michigan.

It is scarcely necessary to say that the Circuit Court of Appeals in its relation to the District Court is strictly and purely an appellate court. It has no jurisdiction or privilege to review or consider any facts or assumed facts that were not before the District Court. Its sole duty is to determine whether or not the District Court, upon the record before it, erred in its decision.

Title 28 U. S. Code 212, 225;
Whitney v. Dicke, 202 U. S. 132;
United States v. Mayer, 235 U. S. 55;
Brown v. Norfolk & Western Railway Co., 20 Fed. (2d) 133;
Chisolm-Ryder Co. v. Buck, 65 Fed. (2d) 735;
American Trust Co. v. Harris, 88 Fed. (2d) 541.

In a modern case the Michigan Supreme Court held that a judge had no right to consider facts discovered by his own observation outside of court and which were persuasive in the decision of the case.

Valentine v. Malone, 269 Mich. 619.

We submit that the rule should apply with redoubled force in an appellate court. The litigant and his counsel have no opportunity to learn the personal experiences of the appellate judges or to discover whether their observations are adequate or whether they have complete knowledge of the facts which they assume to be true. The litigant and his counsel rely upon the judges of the court to remain aloof from the case if they have formed opinions on the facts which affect their consideration of the case. We submit that the litigant has an inviolable legal right to have his case weighed and decided by judges who are wholly unbiased and unaffected by personal experiences or observations concerning the matters before them. This right of the litigant is not a mere privilege which can be suspended or disregarded. It is a fixed legal right which cannot be denied or impaired.

The situation here is extremely unusual because it arises in relation to an appellate court. We find no parallel among published cases although it has been held repeatedly that bias disqualifies a trial judge and is ground for reversal.

Whitaker v. McLean, 118 Fed. (2d) 596;
Commonwealth Tobacco Co. v. Alliance Insurance Co., 238 Mass. 514;
Evans v. Superior Court, 107 Calif. App. 372;
Olive v. State. 11 Neb. 1.

From the foregoing cases we conclude that bias is something to be considered objectively. We are not to consider the question whether the judge himself feels biased. What should be considered is whether, under all the circumstances, a situation is revealed in which, consciously or not, there is a leaning or inclination toward or against a party which is inconsistent with a state of mind fully open

to conviction, whether there is something which sways the mind toward one opinion rather than another and which renders the judge unable to exercise his functions impartially in the particular case.

This Court has held in a petty criminal case that

> "Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required"

or which might lead him

> "not to hold the balance nice, clear and true"

disqualifies the judge.

Tumey v. Ohio, 273 U. S. 510, 532.

When it appears to the litigant or his counsel that there is just cause to believe that the judge or judges are affected by such matters which render their acts biased or prejudiced, then it becomes the privilege, if not the duty, of such party to present that claim promptly and firmly. The claim of bias and prejudice is not an attack upon the integrity or character of the judges. It is simply a claim that in the particular case the judge or judges entertained certain opinions, inclinations or tendencies which are inconsistent with complete impartiality and which tend to close their minds against conviction by the usual methods. Human beings are usually oblivious of their own prejudices.

We contend in this case that the unproved conclusions of fact above referred to actually weighed the minds of the circuit judges against us. We cannot estimate the degree to which they were so influenced. We cannot ignore the fact, however, that the judges were so impressed by their personal observations regarding Charles S. Abbott that they were impelled to remark upon those personal observations in the opinion, and in so doing they used such words as "invited, if they did not compel"; that "We have found the invitation even more alluring." The language used in the last paragraph of the opinion is a

frank admission that the court felt moved by such assumed facts. They felt a definite inclination to search for a certain rule for decision. It is apparent that the judges ultimately believed that they had freed their minds from the effects of those inclinations and that they were prepared to decide the case without respect to them. We cannot, however, escape from the plain import and relationship of these assumed facts as stated. It is clear that the court entered upon consideration of the case with the disturbing belief that Mr. Abbott had been absent from the county limits for several years, going and coming freely, and that such fact was generally known and that (impliedly) the judgment plaintiff must have known it and winked at it and had thereby lulled the officers and the parties to the jail limits bond to sleep on their rights and obligations, even though in an earlier part of the opinion the court expressly held that the plaintiff had not acted in a manner to constitute estoppel. We cannot escape the clear conclusion that the mental processes of the court were in some degree affected by these matters of personal experience. There is no yardstick by which we can measure the degree of that influence.

We submit that under these circumstances the litigant cannot be reconciled to an adverse decision. It is particularly galling when it so clearly appears, as we shall later demonstrate, that the district court decided the case according to clear rules of law and that the appellant court erroneously reversed that decision. We, therefore, submit that a decision made under these circumstances should not stand as final, but should be reviewed and determined solely and clearly upon the facts in the case and the law applicable thereto.

III. THE CIRCUIT COURT OF APPEALS ERRED IN HOLDING THAT MR. ABBOTT LEGALLY SURRENDERED AND THAT THE JUDGMENT PLAINTIFF HAD DUE NOTICE THEREOF.

The judgment defendant Abbott did not surrender in conformity with the statute. The Michigan statute does not provide for a surrender by the defendant himself, but

only by his surety. Mich. Compiled Laws, 1929, Sections 14734, 14735, quoted in division I. of this brief. The surrender in this case was not made or participated in by the surety, United States Fidelity & Guaranty Company.

Under the above statute, surrender must include the following acts:

(1.) The bail (surety) takes the principal to the keeper of the jail.

(2.) He delivers a written requirement to take such principal into custody.

(3.) The keeper of the jail endorses the surrender on the jail limits bond.

(4.) The keeper of the jail, if required, gives the surety a certificate acknowledging such surrender.

The first three of these requirements are indispensable; the fourth is, of course, optional with the surety.

It is not claimed, pleaded or proved that either the principal or the surety complied with any of these requirements. The surety was not even present. No written notice or requirement of any sort was delivered to the sheriff. No endorsement was made upon the bond. As a matter of fact, it is undisputed that there does not exist the slightest record of any kind or description that such an alleged surrender was ever made or attempted. The alleged surrender occurred in January, 1936 (45, 59). It is not claimed that any attempt was made to give written notice to the judgment plaintiff either then or later.

After the alleged surrender five years elapsed, during which time a new sheriff has assumed office (84) and the fraud judgment has been assigned to another party (121a). Counsel representing the surety company and the sheriff then pleaded and offered proof by the mere memories of interested witnesses to show an informal surrender or a qualified and provisional surrender.

In the trial court neither party claimed that any rule of common law could be applied. The defendant expressly

claimed that the proceeding was statutory (11). The judgment defendant Abbott testified to several versions of the circumstances of the alleged surrender (45, 55, 57, 58).

The Circuit Court of Appeals, after finding that the surrender was not in conformity with the statute, held that the judgment defendant was not restricted by the statute because the statutory method was not exclusive and that under the common law

> "A voluntary surrender by the principal is effective where the plaintiff has notice of it as in this case he had."

What notice did the plaintiff have? On January 18, 1938, the United States Marshal called plaintiff's counsel by telephone and said that Mr. Abbott had asked the following question:

> "Whether or not I can go in before the sheriff and give myself up and furnish the statutory $5,000 bond in lieu of the present $20,000 now the subject of the suit and purge the writ" (65, 66).

Two days later the Marshal again called plaintiff's counsel and said:

> "Mr. Abbott has presented himself for surrender to have his bond reduced to $5,000, so that it can be reduced to $5,000"

and asked plaintiff's counsel whether Mr. Abbott's board would be paid (66, 67). It is undisputed that these two telephone conversations, which the Marshal quoted after five years, constitute the only notice or information that the judgment plaintiff or his counsel received regarding the so-called "surrender". These telephone calls came right in the midst of a flurry of motions, affidavits, objections and pleadings which were being filed by Mr. Abbott claiming that the judgment, the body execution and all of the proceedings were void (50).

It must be observed that the alleged notice of surrender, even if accurately remembered, was doubtful and mislead-

ing. It was not a notice which the judgment plaintiff could safely act upon. The judgment plaintiff and his counsel naturally assumed that the opposing party, an experienced attorney and represented by other counsel, would conform with the law. There was no way in which the judgment plaintiff could determine what was meant by defendant's surrendering for some special purpose such as reducing the bond or purging the writ, particularly when the judgment defendant was at the same time attacking everything in the whole case as null and void. We submit that the judgment plaintiff had no actually clear or substantial notice at all of a legal surrender. We, therefore, disagree with the factual premise of the Circuit Court of Appeals.

We submit that there is no common law right of surrender in Michigan as assumed by the Circuit Court of Appeals. Neither party in this case claimed that there was any such right of surrender.

There has never been any "common law" in Michigan on the subject of jail limits bonds and the rights of the parties relating thereto. The matter has always been wholly regulated by statute. Michigan was formerly a part of Northwest Territory and set apart by Congress and given legislative authority. In 1827 the legislative body of the Territory adopted "An Act Concerning Sheriffs" which contained the following provision:

> "Sect. 20. That if any writ shall be granted commanding the sheriff and a keeper of the prison, when any person shall be charged in execution for any debt or damages aforesaid, to have the body of such prisoner with the cause of his imprisonment before any court, judge or justice having authority to issue such writ, and it be returned upon the said writ that such prisoner is charged in execution as aforesaid, then and in every such case such prisoner shall be immediately remanded and shall remain in prison according to law without being let to bail against the will of the party in whose favor such prisoner shall be so charged until satisfaction be made for the sum

adjudged." Vol. 2, Territorial Laws of Michigan, page 382.

Michigan was admitted to the Union and adopted the constitution of 1835, which included a "schedule", section two of which provided:

> "All laws now in force in the Territory of Michigan which are not repugnant to this constitution shall remain in force until they expire by their own limitations or be altered or repealed by the legislature."

After Michigan was admitted to the Union no legislation on the subject of jail limits bonds was enacted until the adoption of the Revised Statutes of 1838. Section 8 of Chapter One of Title VII. of Part 3 of the 1838 *Revised Statutes* provides as follows:

> "Sect. 8. Any debtor who shall have given a bond for the liberty of the prison limits may at any time surrender himself or be surrendered by his surety to the jailer and the bond shall thereupon be void except as to previous breaches."

The other sections of this chapter cover the rights of the parties and the procedure in cases of civil imprisonment. It is obvious that under this section the surrender could be made either by the judgment defendant or by his surety.

This law remained in effect just eight years and was then repealed. The State of Michigan in 1846 adopted a new revision of the statutes, being the Revised Statutes of 1846, and by Section 1 of Chapter 173 of Title XXXIII thereof repealed the Revised Statutes of 1838. Chapter 147 of Title XXVIII of the Revised Statutes of 1846 sets up a new procedure regarding jail limits bonds and escapes, and Sections 6 and 7 of that chapter are identical with the statute now in effect, being Sections 14734 and 14735, Michigan Compiled Laws, 1929, quoted in division I. of this brief. They were readopted without change as a part of the Judicature Act of 1915 (Act No. 314, Mich. Pub. Acts, 1915).

The provisions of the Revised Statutes of 1838 permitting surrender by the principal in a jail limits bond were, therefore, expressly repealed and the provisions of the chapter covering civil imprisonments and jail limits bonds were entirely rewritten. The old procedure, which apparently permitted a surrender to be made without any written record, was entirely repealed. The meaning of the statute which has existed since 1846 cannot be doubted. It is intended to provide a complete procedure which eliminates uncertainty and which may be followed by all parties with safety.

We submit that the comment of the District Court in this case is unanswerable.

> "Abbott's claim of verbal surrender as agent of the surety is too tenuous to warrant serious consideration. It leaves the validity of surrender and the rights of the parties to the uncertainties of proof relating to verbal transactions of several years ago and places plaintiff at the mercy of the imperfect memories of those adversely interested. It is presumed that the specific provisions of the statute making formal requirements in writing were to avoid this precise situation. To sustain defendant's contention on this point would be to place a premium upon avoidance of legal consequences of adjudicated fraud" (107).

The experience of all time has demonstrated that all steps taken in judicial proceedings and their incidents should be matters of written record. Parties in litigation become intensely hostile, and their memories are not only colored, but actually distorted by hostility and self-interest, and the possibility of deliberate falsehood is always present. It was obviously the intention of the legislature, in repealing the old lose practice, to put something better in its place, something which would be consistent with all other judicial proceedings and would safeguard all parties. In this case, for instance, the mere memories of interested parties of events which happened more than five years before the trial were being used to defeat the plaintiff's judgment amounting to more than $12,000.

It is not necessary in this case to determine whether or not the provisions of the statute must be strictly followed because it is undisputed that the statute was not followed at all. The Circuit Court of Appeals referred to the following cases as authorities for its decision:

United States v. Stevens, 16 Fed. 101;
Babb v. Oakley, 5 Calif. 93;
McNeal v. Van Dusen, 142 Mich. 593;
Jones v. Varney, 8 Cush. 137;
People v. Mahoney, 89 N.Y. Sup. 424.

We submit that none of these cases give any support to the opinion of the court. *United States v. Stevens* was a criminal case pending before the trial court. The sole question to be determined was whether or not the trial court should exercise his discretion under Section 1020, Revised States (Title 18 U. S. Code, Sec. 601) and exonerate the sureties on the bail bond. The sureties had surrendered the prisoner, but the surrender was irregular. The prisoner had given a new bail bond and had escaped, but in the meantime had been recaptured and was before the court for trial. The sureties on the original bond paid all accrued costs and petitioned for exoneration. The court exercised its discretion under the circumstances and granted it, but said:

> "Common law defense to an action on a bail bond could only be established by showing from the record that such surrender had been made either by the principal himself voluntarily, or by his sureties; and the record entry of the fact either made on the bail-piece filed in court or otherwise properly noted was styled 'the discharge and exoneration of the bail.'"

Babb v. Oakley was decided in 1855. No opinion was written, but merely a decision. The case does not disclose what statutory provisions were involved or the nature of the case or the circumstances. The case has no weight in considering the interpretation of the Michigan statute.

In *McNeal v. Van Dusen* the endorsement of the surrender was on a piece of paper *attached to* the bond. The Supreme Court of Michigan, of course, held that that was a sufficient record, there being no other irregularity in the proceedings.

Jones v. Varney arose under an entirely different statute. A complete surrender had been made and an accurate record of the surrender had been entered. The court held the provisions of the statute as to subsequent steps after such surrender and record were merely directory. The substance and the protection of the statute were carefully preserved.

People v. Mahoney is a decision contrary to that of the Circuit Court of Appeals in this case. The surrender in that case was held invalid because it was not accompanied by the filing of a copy of the bond. The court said:

> "The statute wisely provides for a formal proceeding and indisputable evidence."

The decision of the Circuit Court of Appeals, therefore, is not sustained by any statutory provision or by a single judicial precedent which can be found anywhere. The case stands all alone and is opposed to and inconsistent with the authorities which the court actually cites in its support.

On the other hand, clear and ample authorities sustain the proposition that statutory provisions permitting surrender under such a bond must be substantially or even strictly followed, or the attempted surrender is void. In Michigan the right of surrender exists under a different but analogous statute in which the proceedings for such surrender are different. When a defendant has been taken in custody under capias ad respondendum before the trial of the case, surrender is made under Section 14727, Mich. Compiled Laws, 1929. That section provides for a surrender before a judicial officer who issues an order to show cause and permits a hearing before the surrender is effective.

The Supreme Court of Michigan has twice held that the provisions of that statute must be fully complied with before the surety on the defendant's bail bond is exonerated.

Elliott v. Dudley, 8 Mich. 62;
Begole v. Stimson, 39 Mich. 288.

It has been uniformly held in other states that surrender by a prisoner in a civil case must be in compliance with the statute in order to exonerate the surety.

664 *Bayridge Ave. Corp. v. Baresca*, 263 N. Y. Sup. 600;
Rust v. Concord Casualty & Surety Co., 112 N.J. Law 74, 169 Atl. 820;
Jupin v. Jupin, 3 N. J. Misc. 163, 127 Atl. 588;
Whitton v. Harding, 15 Mass. 535;
Moran v. Goulcarte, 42 R. I. 112, 105 Atl. 646;
Truitt v. Landesman, 108 N. J. Law 109, 156 Atl. 656;
Modern Finance Co. v. Martin, (Mass.) 42 N. E. (2d) 533;
Carboy v. Smolensky, 11 N. J. Misc. 110, 165 Atl. 97.

In *Rust v. Concord, etc.*, supra, the court expressly held that the statutory requirement of written notice to the plaintiff was not satisfied by the giving of notice by telephone.

In criminal cases the courts have also held that a bail bond can only be discharged by the taking of the steps provided by statute for that purpose and the omission of any such step is fatal.

Edwards v. State, 39 Okla. 605, 136 Pac. 577;
Woodring v. State, 53 Texas Crim. Reports 17; 108 S. W. 371;
United States v. Stevens, 16 Fed. 101;
State v. Tieman, 39 Iowa 474;
Perkins v. Terrell, 1 Ga. App. 250, 58 S. E. 133;
State v. Casey, 44 S. Dak. 311, 183 N. W. 971.

The Circuit Court of Appeals has proceeded on the theory that while the *surety* should be required to follow the statute if making a surrender of his principal, yet the principal may make surrender of himself without regard to any statute. We submit that this theory is too fragile to stand. The principal, Mr. Abbott, is the one who defrauded the plaintiff's assignor. It is from him that recovery should ultimately be made by the plaintiff or by the sheriff or by the surety on the limits bond. We do not admit that the principal has any right at all to surrender himself. If he did have any right to surrender voluntarily, then it seems clear that he must take the same steps which the statute has provided for that purpose and which apply to his surety. We can find no good reason why the party who is seeking to defeat the judgment or to avoid its consequences should be permitted to confuse, to mislead or to deceive the other interested parties in the matter by words and actions which might be construed to mean several different things. The district judge who saw and heard the witnesses in the case held that Mr. Abbott made no good faith attempt to surrender (108). Mr. Abbott was undoubtedly purposely trying to confuse and mislead the judgment plaintiff. As we have previously pointed out, he now appears to be unable to give any single clear version of what happened on the occasion of the alleged surrender.

We cite these facts to demonstrate how unreasonable and how dangerous it is to permit the judgment defendant in the case to lightly disregard a statute which has been adopted for the very purpose of requiring a written record which will safeguard all parties and which will prevent the defendant from committing another fraud against the plaintiff. We submit that the case is not a close one and that the decision of the Circuit Court of Appeals is clearly contrary to well established and unquestioned law, and it is extremely doubtful whether the court would have reached the same result in the absence of the circumstances which we have discussed in part II. of this brief.

IV. THE QUESTIONS SUBMITTED.

Petitioner does not waive any of the errors and reasons for reversal of the Circuit Court of Appeals which are stated in his petition for certiorari, but relies upon all of them and will cover them in his brief to be filed if a writ of certiorari shall be granted. They are not discussed further in this brief because we wish to present quite explicitly the matters above discussed and at the same time conform to the rule of this Court which requires this brief to be concise. The reasons which are not actually discussed in this brief will, to a large extent, be clearly understood by this Court when considered in connection with the points which we have discussed.

We submit that the first proposition which we have discussed presents a very compelling reason why this Court should review the decision of the Circuit Court of Appeals. The Circuit Court of Appeals assumed without proof that a certain individual had been absent from a certain county for years. It assumed without proof that the individual had been generally regarded as not being a resident of that county. We deny that these facts are true. The Court, however, was so impressed by these assumed facts that it included a recital thereof in its opinion and recited them in such intimate relation with its course of reasoning as to show that these assumed facts weighed upon the minds of the judges throughout their deliberations. We submit that this situation must arouse the interest of this Court and must prompt this Court to review the case in order that the standard of judicial determination which has always prevailed heretofore in the United States Courts shall not deteriorate. We submit that when it cannot be determined to what degree the decision of the case was affected by these elements, then the doubt should be resolved in favor of the aggrieved party so that his case may be finally determined in an adjudication which is wholly free from those doubts.

We also submit that the Circuit Court of Appeals committed plain error in its interpretation and application of the law of the case. We claim that the decision is the opposite of the decision which would be made by the Su-

preme Court of Michigan in view of the statute and in view of the analogous cases which have been decided under a somewhat similar statute. We claim also that the decision of the Circuit Court of Appeals is clearly contrary to all of the general authorities on the subject and is not supported by any single authority in any state or federal court, and that it establishes a method of procedure which is dangerous, which is inconsistent with judicial procedure generally, and which results in clear injustice in this case and opens the door to injustice, fraud and over-reaching in all cases which shall be affected by the decision. We submit that the decision of the District Court followed the law, and the decision of the Circuit Court of Appeals is very clearly contrary thereto.

For these reasons the prayer of our petition should be granted and a writ of certiorari should issue.

Respectfully submitted,

DEAN S. FACE,
Attorney for Petitioner.

(NOTE: In view of the language of the order denying our petition for rehearing in the Circuit Court of Appeals, we think it is fair to state that the writer of this brief afterward, by private communication, assured the judges of that Court that no doubt of their integrity or sincerity of purpose was entertained by him or to be implied; and the Circuit Judges, by private communication, fully accepted that assurance—Dean S. Face).